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COMMERCIAL LIBERTY AND GOVERNMENTAL REGULATION OF THE RAILROADS.

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PREFATORY NOTICE.

In the following statement I have attempted to place the subject of the railroad regulation upon higher ground, namely upon the maintenance of commercial liberty in this country, the nationalization of the American Railroad System and the practical determination of rates through the compulsion of commercial forces. These controlling conditions are mainly the result of that freedom of commerce which was legalized by the Act of June 15, 1866, known as the "Charter of the American Railroad System."

The subject is an exceedingly broad and complex one. The present statement is confined to some of its more salient features. In the future I shall devote my attention largely to this subject.

JOSEPH NIMMO, JR.

WASHINGTON, D. C.
November 12, 1906.

COMMERCIAL LIBERTY AND GOVERNMENTAL REGULATION OF THE RAILROADS.

INTRODUCTORY REMARKS.

The proposition to confer upon the Interstate Commerce Commission the power to prescribe rates which shall be charged for transportation services on railroads was fought out during the first session of the present Fifty-ninth Congress. The debate from early in January to June 29th, 1906, was thorough and upon many points exhaustive. The conclusion reached by a practically unanimous vote was that governmental rate-making is unconstitutional, prejudicial to the commercial and industrial interests of the country and from the political point of view subject to grave objections. This conclusion, however, is still strenuously opposed by the advocates of governmental control of the commerce of the country. New schemes for the accomplishment of their original purposes are being devised. Recently it has been authoritatively declared **that the United States Government has and is to exercise a constantly increasing and constantly more effective supervision and control over all the work of the great common carriers of the country and over the work of all the great corporations which directly or indirectly do any interstate business.**

This latest demand of the advocates of governmental control of the transportation, industrial and commercial interests of the United States is as indefinite as it is comprehensive.

The difficulty with those gentlemen is that they fail to differentiate between that commercial liberty which from the beginning has prevailed within all our borders and that contemporaneous restraint upon common carriers in the work of preventing acts prejudicial to justice and order in the conduct of interstate commerce. No positive information is afforded in regard to the nature or methods of the proposed governmental supervision and control of the railroads and of the interstate commerce of the country.

An attempt will be made to show that the success of such a scheme would overthrow commercial liberty in this country and in its place set up the rule of bureaucratic government, a rule which would be revolutionary and destructive.

The problem of just and beneficent restraints upon railroad transportation protective of the general public interests in this country may be regarded as practically determined. Much, of course, remains and always will remain to be done in the way of adjustment. But the threatening danger of governmental supervision and control of the railroads, involving governmental rate making, looms up in various forms and from various sources. Hence two vitally important questions arise, namely: *First*, in what manner and to what extent has the evolution of the American Railroad System conserved the commercial liberties of this country, and, *second*, in what manner and to what ex-

tent has the evolution of the American Railroad System tended toward the nationalization of the railroads of this country? These questions must be answered in the light of the national experiences during the last forty years. Their complete elucidation greatly exceeds the proper limits of this paper.

COMMERCIAL LIBERTY UNDER THE AMERICAN RAILROAD SYSTEM.

Prior to the year 1861 the railroads of this country were, as a rule, disconnected. Each line was practically a law unto itself. But the experiences of the country during the Civil War—1861 to 1865—clearly demonstrated the fact that the railroads must be connected for military, postal and commercial purposes and be operated as one united system of transportation. At the close of that momentous struggle, national ideals were more clearly defined and more pronounced than at any previous period in the history of the country. The demand for a united railroad system came from the north, the south, the east and the west. It was voiced by the social, political, commercial, industrial and transportation interests of the entire country. Within one year after the war ended this sentiment had become a settled political purpose.

By the Act of June 15, 1866, properly designated as "The Charter of the American Railroad System," Congress authorized all the railroad companies of the country to connect their lines and to engage in joint traffic, thus forming one closely combined and intimately associated national system of transportation. It was then and is to-

day the unquestioned and unquestionable decree of the people of this country that the union of transportation lines, like the union of States, "must and shall be preserved." In time this was accomplished. As the result of uniformity in the construction and operation of railroads this country now enjoys the advantages of a homogenous system of internal commerce. The American railroad system has thus become thoroughly nationalized and the commerce of the country has entered upon a new life throughout the entire national domain. States of the Union have contributed to this benign result by solicitous invitations extended to the railroads of other States to cross their State lines and freely enjoy the privileges of interstate commerce without any impediment whatsoever. More than nine-tenths of the internal commerce of the country is now carried on by railroad companies.

That the Act of June 15, 1866, may properly be regarded as in the nature of a charter is evident from the fact that it is permissive and enabling. It simply authorizes the railroad companies of the country to connect their respective lines and to engage jointly in interstate commerce.

The chief merit of the Act of June 15, 1866, consists in the fact that it provides for each State, section and interest of the country a condition of perfect equality before the law. In this regard it has the force of a governing principle of organized society.

Commercial liberty under the facilities for trade afforded by the American Railroad System, as it has existed during the last forty years, may be defined as the right of every

locality in the country to engage in commerce subject to no other restraints in the nature of regulation than those which are essential to the maintenance of order and justice and which comport with the genius of our institutions.

Upon the basis of the rights and privileges thus inaugurated the grandest system of commerce and transportation on the globe has been provided and a uniform system of commercial usages and relationships has been established, whose inspiring motive is commercial liberty. The common demands and usages of the whole country, which have their origin in a closely connected and intimately associated American Railroad System, constitute the unwritten law of our national life, as imperative as are the provisions of our written national charter of government with which this unwritten law is in thorough accord. The nationalization of the American Railroad System is not only based upon physically connected lines, but upon common and reciprocally related commercial interests.

RAILROAD REGULATIONS IN THIS COUNTRY RESPONSIVE TO THE DEMANDS OF COMMERCIAL LIBERTY.

At the very beginning it became apparent to the companies whose lines formed the constituent elements of the American Railroad System that such a vast and complex organization must be provided with some form of government conformable to the true American idea of liberty regulated by law. This was necessary in order to secure the ends of order and justice. At first the managers of the principal railroad lines attempted by agreements among themselves

to restrain the practice of rebates and other departures from just and beneficent practices. But the forces of competition between rival roads, rival localities and rival industries, in the absence of legal restraints, were too strong for the companies. Their efforts at self-government failed. Accordingly the aid of Congress was invoked by popular acclaim. The result has been that the Interstate Commerce Act of 1887, as amended, including the Elkins Act of 1903, and the Act of Congress which became law on June 30th, 1906, in some of their essential features are but duplications of the wholesome provisions for just regulation attempted by the companies many years before, but which failed to become effective for lack of legal authority. The work of beneficent regulation has thus gone on progressively and it will proceed as the necessity for new restraints at once protective of the railroad interests and of the general public interests shall be proved by the lessons of experience to be expedient, subject always to the supreme object of securing the ends of commercial liberty. This object of supreme importance has been safeguarded by confining such regulation to continuous service on particular lines, under substantially similar circumstances and conditions. Beyond such limitations commercial forces determine both absolute and relative rates, and these forces must for all time be regulated by the provisions of the common law as developed in the course of the interaction of the commercial and industrial activities of the country.

The most important characteristic of commercial liberty upon the developed American Railroad System is that any railroad company or combined companies may, under the

stress of commercial conditions, prescribe rates from any point in one State to another point in any other State which rates will even in the slightest degree prove remunerative, or tend to promote commerce. The effect of this freedom of traffic movement has been to promote the commerce of the country and to give to every State and locality practically equal privileges and opportunities for commercial development. As hereinafter shown, this particular feature of commercial liberty, enjoyed throughout the railroad system of the United States, has been declared by the Supreme Court of the United States to "comport with the genius of our governmental institutions."

HOW THE MAINTENANCE OF COMMERCIAL LIBERTY BECAME THE DOMINANT RULE OF RAILROAD TRAFFIC MANAGEMENT IN THIS COUNTRY.

During the early period of railroad construction in this country when each road was operated independently of all others the several companies assumed that they could of right exercise a degree of control over the course and conditions governing commerce over their respective lines. Accordingly attempts were made by certain of the stronger companies to secure the control of the principal trade currents of the country by the construction of great trunk lines with branches which should reach the sources of traffic within certain defined geographical areas. The propriety of such action was not then called in question, for the railroad traffic policy of the country has from the beginning

been in the nature of an evolution. But such efforts to control the course of commerce, involving the expenditure of hundreds of millions of dollars, eventually failed for the reason that the trade forces of the country were vastly more potential than are all the forces which railroads or combinations of railroads could bring to bear against them. For several years this constituted the puzzle of railroad management in this country. At last the Pennsylvania Railroad Company, the most extensive trunk line system in the United States, decided to investigate and, if possible, to determine the whole subject of the relations of the railroads to the commercial and industrial interests of the country with the object in view of deciding as to the line of policy which should be adopted and permanently pursued by that company. This difficult problem was committed to a commission composed of able men conversant with the subjects of production, trade and transportation. As the result of their careful investigations the commission reported as follows during the year 1874:

"Experience in the West has demonstrated that a railway cannot determine the route or destination of traffic originating on its line, and certainly has no controlling influence over trade at competitive points. Elements independent of the way of carriage first determine the destination of freight. After that, questions as to speed, safety, rates, &c., fix the route. With so many competitive points in the West the railway companies recognize their true interests in furnishing every facility to the shipper of freight, and do not attempt **by possible hindrances or unwise charges to defeat his interests, resulting, as it would, to the injury of the railway companies.**"

The effect of this conclusion upon the conduct of the interstate commerce of the United States was marvelous.

The railroad managers of the great trunk lines of the country awoke as from a troubled dream. Gradually attempts to dictate the course of the commerce of the country were practically abandoned until finally no compulsion on trade was exercised by the companies except that which incidentally and inevitably arises from the competition between rival lines. Stated in other terms, the vast extension of the facilities for railroad transportation in the United States has created a constant and irresistible tendency toward a parity of values, and this has reacted upon the railroads in the constant reduction of rates.

The late Albert Fink, author and administrator of the scheme of railroad self-government, was an earnest advocate of commercial liberty as herein outlined. This is clearly indicated in his statements to me while I was engaged as an officer of the Government in writing reports on the Internal Commerce of the United States.

The conclusion of the matter is that trade forces dominate the forces of transportation. From this there is no appeal. The railroads are, therefore, compelled to make rates conformable to the exigencies of commerce, and this, as indicated by the Supreme Court of the United States, is of the very essence of commercial liberty.

Thus the railroads of the country have become the servitors of commerce and industry and the combined American Railroad System has become the fundamental condition of commercial liberty throughout all our borders.

A thousand illustrations might be adduced indicating the subserviency of railroads, singly and in combination, to the exigencies of trade and production in all parts of

the country and notably throughout the Southern States and the States and Territories served by the transcontinental railroads. In a word, the competition of commercial forces has become the governing principle in the determination of interstate rates for transportation services. This, as hereinafter observed, is clearly recognized by the Federal judiciary.

It is inconceivable that the people of this country will ever permit the national Government to establish any administrative control over the railroads of the country which will compel them to resist the leadings of commercial forces or to deny to any shipper the privileges of commercial liberty upon which the business prosperity of the country now securely rests.

The conclusion reached by the railroad companies of conformity to the natural trend of commercial conditions has done vastly more for the promotion of commerce and for the beneficent regulation of commerce and transportation in the United States than all the laws in regard to railroad traffic operations enacted by all the States and by the Congress of the United States combined.

From the foregoing it appears that the course of the development of the commerce of this country has been determined mainly by the interaction of commercial forces, and in a much less degree by transportation companies. It can never be dictated by governmental authority. That would be to eliminate commercial liberty and to inaugurate the autocratic rule of bureaucratic government, which is repugnant to every conception of American liberty.

MATERIAL RESULTS OF COMMERCIAL LIBERTY IN THE UNITED STATES.

The results of commercial liberty under our closely combined and intimately associated American Railroad System may be summarily stated as follows:

1. The wealth of the United States increased from $16,159,616,000 in 1860 to $94,300,000,000 in 1900. The *Manufacturers' Record*, of Baltimore, Md., in its latest issue, estimates the present value of the property of the fourteen Southern States at $18,000,000,000, which is nearly $2,000,000,000 more than the total value of the property of the whole country in the year 1860. It is an admitted fact that the extension of railroads throughout the South constitutes the essential condition to this enormous development of wealth.

2. The phenomenal increase in the wealth of the United States has been quite evenly distributed throughout the various sections and States of the Union.

3. The railroad mileage of the United States in the year 1866, when the American Railroad System was inaugurated by Act of Congress, was 36,085 miles, it had increased to 212,314 miles at the end the year 1905. This increase of mileage was quite general throughout the various States and sections of the Union. Besides the efficiency of the railroads of the country, having regard to roadway, equipment and management is probably five times as great as it was in the year 1866.

4. No complete data exists in regard to the tonnage of freight by rail prior to the year 1882, but it is safe to say that the internal commerce of the country over railroads

was ten times as great during the year 1905 as when the American Railroad System was authorized by the Act of June 15, 1866. This phenomenal increase of commerce was quite general throughout the country.

5. With constant improvements in the facilities for railroad transportation in the United States the average freight charge throughout the country is less than one-third the average freight charge when the American Railroad System was formally inaugurated in the year 1866. For example, the average rate charged for transporting freight on the railroads of the United States fell from 1.24 cents per ton per mile in 1882 to $\frac{77}{100}$ of a cent per ton per mile in 1904, a decrease of 38 per cent. On the basis of receipts from freight during the year 1904 this amounted to a saving of about $800,000,000 to the people of the country during that year.

THE SUCCESS OF GOVERNMENTAL REGULATIONS NOW IN FORCE INDICATIVE OF THE BENEFICENT RESULTS OF COMMERCIAL LIBERTY.

The predominance of commercial forces over those of transportation throughout the United States, in the conduct of railroad freight traffic illustrates the beneficence of the open market where the conservatism which inheres in the untrammelled interaction of forces has its best and most effective expression. The instant transmission of commercial intelligence causes these forces of commerce to become everywhere potential. The result has been that commerce has become a law unto itself, establishing relative stand-

ards of value throughout the entire country. This is operative primarily upon prices, and next upon the charges which may be imposed for transportations, determining both absolute and relative rates. The beneficent influence of this law of trade is clearly illustrated in the exceedingly small number of litigated cases which have arisen in the administration of the Act to Regulate Commerce. This is indicated by official statistics as follows:

During the first eighteen years of the existence of the Interstate Commerce Commission from 1887 to 1905 there were approximately three thousand million freight transactions in the United States (3,000,000,000).

During the same period of eighteen years from 1887 to 1906 the results of the administration of national railroad regulation as stated by the Interstate Commerce Commission were as follows:

Total number of complaints entertained by the Commission	9,099
Total number of complaints disposed of through the mediatorial office of the Commission	9,054
Total number of cases appealed to the courts	45
Total number of cases sustained by the courts	8

Of the eight cases sustained by the courts out of three thousand million freight transactions, all involved unjust discriminations and not a single case involved an exorbitant rate. The chairman of the Commission has declared that exorbitant rates in this country are an obsolete question. In a word, out of three thousand million freight

transactions (3,000,000,000) between the years 1887 and 1905, there were proved in the courts only eight cases of unjust discrimination and *not a single case of exorbitant rates.* This has been a natural result of the constant fall of rates, which in turn has resulted from the generally accepted terms of commercial liberty. It is a result as near to absolute perfection as seems possible in the conduct of human affairs, and constitutes an apparent mathematical demonstration of the efficacy of commercial liberty throughout our nationalized American Railroad System, as a regulative force in the conduct of the traffic of the railroads of this country.

COMMERCIAL LIBERTY AS JUDICIALLY DEFINED.

Commercial liberty, as secured to every citizen under the provisions of the Constitution of the United States and the various statutory enactments relating to the subject as judicially determined is the right of every person to ship goods from any point in one State to any point in another State at any just and reasonable rate which may be deemed remunerative to the carrier, provided that at the same time every other person is allowed to ship similar goods from the same point of shipment to the same point of delivery at the same rate. This seems to mark in general terms the proper delimitation between the rights of commercial liberty and the just and proper exercise of measures in the nature of railroad regulation. A great deal of misapprehension and error has, however, arisen in regard to this delimitation, giving rise to the following questions:

FIRST. How far does the principle of commercial liberty extend in the actual conduct of commercial enterprise, having especial reference to railroad transportation?

SECOND. In what manner and to what extent can commercial liberty be limited by restraints in the nature of regulations for securing the just and orderly conduct of the railroads of the country?

These two questions were judicially determined in the so-called Texas Pacific Railway case decided March 30, 1896—162 U. S., 197. The main points involved in that leading case are as follows:

Complaint having been made to the Commission that the Texas & Pacific Railway Company was engaged in transporting over its line goods imported from ports in England via New Orleans and destined to San Francisco on through bills of lading, at lower rates than were at the same time in force upon its inland tariff from New Orleans to San Francisco, on January 29, 1891, the Commission ordered the railroad company to forthwith cease and desist from this practice. The company refused to obey this order upon the ground that it was acting within the limits of its legal rights

The Supreme Court, in its decision rendered March 30, 1896, sustained the contention of the railroad Company and overruled the view sustained by the Commission, at the same time announcing the broadest possible doctrine of commercial liberty, both in its national and international aspects. The opinion of the court in this leading case is based both upon constitutional provisions and upon con-

siderations of public policy, having their origin in what the court was pleased to term "the genius of our institutions." The whole opinion, which is elaborate, constitutes a most interesting and instructive exposition of the judicial view upon the subject of commercial liberty. For the purposes of this statement the following quotations from the decision must suffice. Omitting reference to the special features of this case, the general principles of commercial liberty enunciated by the court were as follows:

"It could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation."—p. 211.

"It could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to consumers within the United States. Clearly, express language must be used in the act to justify such a supposition."—p. 218.

"The Commission is not only to consider the wishes and interests of the shippers and merchants of large cities. but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public."—p. 218.

"In construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and therefore most likely to have been the construction intended by the law making power."—pp. 218–219.

"The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."—p. 219.

"*Whatever would be regarded by common carriers, apart from the operation of the statutes*, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust' Some charges might be unjust to shippers, others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission."—p. 219.

"We think it evident that those facts and matters which carriers, *apart from any reason arising under the statutes*, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."—p. 220.

"The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy."—p. 22.

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." —p. 232.

"Among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that effects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."—pp. 233–234.

"The general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the Act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and *undertaking to change the laws and customs of transportation* in the promotion of what is supposed to be public policy."—p. 234.

The foregoing extracts from the opinion of the Supreme Court of the United States in the Texas and Pacific Railroad case constitutes an epitome of the judicial opinion as to what constitutes the essential elements of commercial liberty in this country.

COMMERCIAL LIBERTY BROAD BASED UPON A FUNDAMENTAL PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

Section 8 of Article I of the Constitution of the United States provides that "Congress shall have power to regulate commerce among the States." This constitutional provision has been characterized as "The Sleeping Giant of the Constitution." This is believed to be a great mistake. Section 9 of Article I of the Constitution provides that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." This limitation upon the power of Congress to regulate commerce is the real "Sleeping Giant of the Constitution." It is an undoubted fact of history that the Constitutional Convention of 1787, was, at first, strenuously opposed to any specific provision granting to Congress the power of regulating commerce among the States, a power the exercise of which by Great Britain, under the colonial government, and subsequently by the States under the Confederacy had been fraught with disastrous results. It was believed that the common law as understood and applied in the States was amply sufficient for all necessary and expedient regulations of interstate commerce. This it actually proved to be for nearly one hundred years after the Constitution was adopted. It is also an historical fact that it would have been impossible to incorporate in the Constitution the commercial clause of Section 8 until it was agreed that it should be limited by the "No preference" clause of Section 9 already quoted.

There is another reason which leads to the conclusion that the "No preference" clause of Section 9, Article I of the Constitution is entitled to the designation of "The Sleeping Giant of the Constitution."

When the Constitution of the United States was adopted the ports of the United States embraced only seaports or landing places on the Atlantic Coast and on rivers from the eastern border of Maine to the southern border of the State of Georgia. At the present time, besides the ports of the Atlantic, Gulf, and Pacific coasts, Congress has from time to time created "ports" at interior points on rivers, on the Great Lakes, and on railroads, all of which ports now afford all necessary facilities for the conduct of both internal and foreign commerce. Therefore the constitutional limitation "No preference shall be given by any regulation of commerce to the ports of one State over those of another" now has in practice a much broader significance than it had when adopted.

The meaning of the word "port" in the Constitution was undoubtedly that which it had and still has in Great Britain. The exact meaning of the word "port," according to Lord Esher, M. R., in 15 Q. B. D., 580—a case decided in the year 1885—is "not usually the legal port as defined by acts of Parliament, * * * but any place at which the loading and landing takes place." Accordingly in the case at bar, it was ruled that "the word 'port' in a charter party is to be understood in its popular, business or commercial sense, and not the port as defined for revenue or pilotage purposes." This is the meaning given to the word "port" by Lord Chief Justice Hale in "De Portibus

Maris," chapter 2, page 46, and it is regarded by Bouvier, an accepted American authority on legal terms, as defining the meaning of the word "port" in the United States. It applies to all places or markets where goods are shipped or received by rail or water. In a word the limitation upon the power of Congress to regulate commerce among the States to-day, implies that **no preference shall be given by any regulation of commerce to any place where goods are received or shipped in one State over those of another.**

In view of this definition of the word "port," the evident significance of the constitutional limitation as applied to present conditions is that Congress shall not meddle in any way with interstate commerce otherwise than may be necessary in order to establish justice, "insure domestic tranquility" and secure to every person the right to live and labor in an open field and in a pure atmosphere. This is fully provided for in the common law as developed, and particularly as developed in the Act to Regulate Commerce, approved February 4, 1887, as amended by subsequent statutory provisions. The practical conclusion arising from this line of thought is that the limitation imposed upon the regulation of the interstate commerce of the United States is that it secures the fullest commercial liberty within all our borders and therefore secures therein the most complete freedom of competition both in commerce and in transportation.

Therefore it appears that the "no preference clause" of Section 9, Article 1, of the Constitution of the United States has become the constitutional guaranty of that par-

ticular phase of commercial liberty which has come as the result of the evolution of the American Railroad System, and which has secured the thorough nationalization of that mighty system of internal transportation.

A DANGEROUS EXERCISE OF AUTOCRATIC POWER.

A most dangerous exercise of autocratic power proposed by the advocates of governmental rate-making is that the Interstate Commerce Commission shall be invested with the power to determine relative rates between different points in different States and between different sections of the country. This idea, which goes in the face of every just and rational conception of commercial liberty, appears to be based upon certain fanciful views of the Interstate Commerce Commission as expressed in official utterances, to which, apparently, it still adheres. In its annual report for the year 1893 the Commission declared at pages 10 and 11 that it ought to be invested not only with the power to determine rates, but also with the power to determine the relative commercial status of the various towns, cities, sections and industries of this vast country. This was expressed as follows:

"To give each community the rightful benefit of location, to keep different commodities on an equal footing so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonably just to both shipper and carrier is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of public regulation."

In an argument addressed to the Senate Committee on Interstate Commerce on March 16, 1892, the Commission made the following astounding declaration:

"The commercial development of the country has outgrown the capacity of the common law and the ordinary judicial tribunals to adapt themselves, under certain circumstances to the complete and effective administration of justice."

At page 59 of its ninth annual report, submitted December 2, 1895, the Commission said:

"The guardianship of the public interest so far as interstate commerce is concerned is, under existing law, intrusted to this Commission * * * to some extent every question of tranportation involves moral and social consideration, so that a just rate cannot be determined independently of the theory of social progress. This argument is perhaps as indefinite as it is comprehensive."

It seems to go without saying that these ideas express the most fantastic idealism. No legislative or administrative authority can ever be entrusted with the power to determine the course of the commercial or industrial development of this country. And any attempt by statutory authority to restrain or unduly fetter that vastly expanded commercial liberty begotten of the Act of June 15, 1866, and ever since cherished by the American people, would undoubtedly create in this country political disturbance as serious as a proposition to repeal one of the fundamental provisions of the Constitution of the United States

In a recent case the Interstate Commerce Commission attempted to exercise the power to determine relative rates between different commercial centers and different sections of the country. The absurdity and serious nature of such attempted exercise of despotic power are so clearly exposed by Mr. Commissioner Clements in a dissenting opin-

ion that I cannot do better than adopt his view upon the subject as expressive of my own. His language upon this point is as follows:

"The facts disclosed do not, in my judgment, justify the conclusions reached for the reason that I believe they do violence to the great principle of competition which the Congress and the Supreme Court have so jealously and consistently nourished as one of the fundamental rights of the public."

And again—

"The expectation of putting these questions to ultimate rest could spring only from a Utopian dream. Their permanent rest is perhaps neither practicable in view of the interests of the ports and carriers, nor desirable in the interests of the public."

In these forceful and patriotic utterances Mr. Clements has given expression to those imperious demands of commercial liberty to which all laws, and all administrative procedure and all judicial conclusions must yield.

Any attempt to regulate the railroads which involves any interference with or any abridgment of the rights of commercial liberty as defined by the Federal judiciary and as generally understood in this country will meet the indignant protest of the American people.

In concluding this branch of argument I recall the following recent public utterance of the Philadelphia Board of Trade:

"If communism is to become a potential force in this country, it will not rest satisfied with the confiscation of railroad properties, nor even with the administrative regulation of the price of transportation, but it will with equal vigor and success, attempt to regulate the prices of all commodities and attack all property.

THE RESTRAINT OF COMMERCIAL LIBERTY NOT A PROPER REMEDY FOR CORPORATE EVILS.

There are men prominent in the discussion of public affairs who maintain that trusts, monopolies, and other vicious combinations in restraint of trade, should be suppressed under the authority of an administrative board invested with the power to curtail or destroy the rights of commercial liberty, as hereinbefore outlined. It is sufficient in this connection to declare the proposition to be un-American, despotic, and, upon its face, absurd. These men fail to observe the broad distinction which lies between the punishment of crimes and the maintenance of the commercial liberties of a great nation. In an address delivered at Pittsburg, Pa., on October 14, 1902, the Hon. Philander C. Knox, then Attorney General of the United States, and now a Senator of the United States, said :

"The time never was when the English-speaking people permitted the articles necessary for their existence to be monopolized or controlled, and all devices to that end found condemnation in the body of their laws. The great English judges pronounced that such manifestations of human avarice required no statute to declare their unlawfulness, that they were crimes against common law—that is, against common right. It is difficult to improve upon the great unwritten code known as the common law. Under its salutary guaranties and restraints the English-speaking people have attained their wealth and power. It condemns monopoly, and contracts in restraint of trade as well."

The common law, as developed, in order to meet the conditions of the present day, still condemns monopoly,

contracts unreasonably or unjustly in restraint of trade and combinations inimical to the freedom of commerce, and as steadfastly as ever defends the commercial liberties of the country. The public sentiment of the country is to-day overwhelmingly in favor of both these propositions.

On November 1, 1906, the Honorable Elihu Root, Secretary of State of the United States, in an address at New York, drew the line between the prevention of corporate evils of monopolies, trusts and other combination inimical to the public interests and the "full limit of constitutional power" which maintains inviolate the commercial liberties of the country. In that connection Mr. Root said :

"Not a single principle is invoked in this warfare against corporate wrongdoing that has not for centuries been familiar to the common law of England and America ; no control is asserted over business, which was not recognized and approved in the days of Mansfield and Eldon, Marshall and Kent ; but to exercise that same measure of control under the new conditions of our day, new agencies and methods have had to be provided by law *and sanctioned by the courts.*

For the accomplishment of this due measure of control, which from time immemorial our laws have recognized as necessary, the Government of the United States has taken up the task where the several States have failed, and is performing, and purposes to perform, its duty *not beyond but to the full limit of its constitutional power.*"

As already stated, the Supreme Court of the United States has declared that "the limit of the constitutional power" of the National Government, maintains inviolate the principles of commercial liberty as it did in the days of Mansfield and Eldon, Marshall and Kent.

In conclusion I repeat that aside from all constitutional restraints the people of this country are of one mind in regard to the inviolability of commercial liberty, especially as it has been manifested to the people of this country, in the course of their commercial experiences, during the last forty years, under the provisions of the Act of June 15, 1866—"The Charter of the American Railroad System."

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